IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 09 of 2023

BETWEEN: **TOVA RA FARMS LIMITED** a duly incorporated company having its registered offices at Suva

PLAINTIFF

AND: **VADIVELLU PILLAY aka WELLA PILLAY aka VADIVELLU PILLAY** of Lot 16 the Cove, Denarau, Nadi, Fiji, Businessman.

DEFENDANT

Before: Mr. Justice Deepthi Amaratunga

Counsel: Mr. Savou J for the Plaintiff
Ms. Maharaj K for the Defendant

Date of Hearing: 08.03.2023

Date of Judgment: 21.03.2024

JUDGMENT

INTRODUCTION

[1] This is an application seeking leave of the court in terms of Section 12(2)(e) of Court of Appeal Act 1949 for appeal against the order for cost amounting $4,000 assessed summarily. Plaintiff instituted this action by way of summons seeking removal of caveat and also damages from Defendant for wrongful or unlawful lodgment of the caveat. In the judgment handed down on 12.05.2023 held that Defendant had no caveatable interest on the said property and also granted $4,000 as cost assessed summarily exercising the general discretion of the court. It is trite law that cost follow the event and Defendant who had wrongfully lodged the caveat must pay the costs associated with this this application to Plaintiff. The discretion granted for the court to assess summarily the cost of litigation is exercised in this case and $4,000 is not excessive considering the circumstances of the case considering that Plaintiff had instituted this action and had also taken steps to proceed to hearing where even written submissions filed and oral hearing was also conducted. Defendant had not appealed against the order for removal of caveat, but seeks to appeal against the order for cost of $4,000. Court of Appeal Act 1949 required leave from this court for such an appeal that confined to order of cost. This is to allow appeals only on the amount of cost to meritorious appeals. According to Defendant $4,000 as cost of this action is exorbitant. On what basis such a ground is alleged is not clear. Defendant had not addressed any facts as to assessment of cost at the hearing hence the court can exercise its discretion from the facts available on record and a cost of $4,000 is not excessive. Leave for appeal against order for cost is refused and considering circumstances. Cost of this application to be assess if not agreed between the parties.

ANALYSIS

[2] Section 12 (2)(e) of Court of Appeal Act 1949 states that no appeal shall lie

> "(2)(e) without the leave of court or Jude making the order, from an order of the High Court or any Judge thereof made with the consent of the parties or as to cost only

[3] So the rationale of the above provision is clear. When the appeal is confined only to the cost or to orders made by consent of the parties leave of the court is required to appeal in order to reduce unmeritorious appeals being made to Court of Appeal.

[4] Supreme Court Practice (UK) (White Book) (Vol 1)

P 930 at para 62/2/34 stated

"Appeal as to costs-S.C.A. 1981, s.18(1)(f)(re-enacting.A.1925, s.31(1)(h)Vol 2, Pt 17 enacts that, 'No appeal shall lie to the Court of Appeal without leave of the Court or tribunal in question , from any order of the High Court or any other Court or tribunal made with the consent of the parties or relating only to costs which are by left to the discretion of the Court or tribunal.' In view of the above section , no appeal against a decision on costs can be entertained unless the trial Judge by taking into account some matter wholly unconnected with the cause of action or by being without materials on which to exercise discretion not in law exercised his discretion at all ***Jones v McKie an Mersey Docks and Habour Board*** [1964]1 WLR 960, 1964 2 All E.R 842 See also Anglo-Cyprian Trade Agencies Ltd v Paphos Wine Industries Ltd [1951] 1 All E.R. 837….." (emphasis added)

[5] In ***Jones v McKie and Mersey Docks and Harbour Board*** [1964] 2 All ER 842 a similar provision in Uk statute was discussed by UK Court of Appeal after refusal of leave to appeal against an order for cost by judge of the original court. It was held,

"Section 31(1)(h) of the Supreme Court of Judicature (Consolidation) Act, 1925, provides that no appeal shall lie "without the leave of the court or judge making the order, from an order of the High Court or any judge thereof made with the consent of the parties or as to costs only which by law are left to the discretion of the court."

This, of course, is not an appeal from the High Court; but, as I understand it, the same principle has to be followed having regard to the appropriate section, s 260, of the Liverpool Corporation Act, 1921. The position is, therefore, whether this appeal is a permissible appeal having regard to the provisions of that section.

The effect of the section was considered in ***Donald Campbell & Co Ltd v Pollak*** where in a celebrated and oft quoted passage Viscount Cave LC described the effect of it as follows ([1927] All ER Rep at p 41; [1927] AC at p 811):

"It appears to me that the true view is substantially that taken by LORD STERNDALE, M.R., in the passage in his judgment in ***Ritter v. Godfrey*** which I have quoted. A successful defendant in a non-jury case has no doubt, in the absence of special circumstances, a reasonable expectation of obtaining an order for the payment of his costs by the plaintiff; but he has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion, like any other discretion, must of course be exercised judicially, and

the judge ought not to exercise it against the successful party except for some reason connected with the case. Thus, if—to put a hypothesis which in our courts would never in fact be realised—a judge were to refuse to give a party his costs on the ground of some misconduct—wholly unconnected with the cause of action or of some prejudice due to his race or religion or (to quote a familiar illustration) to the colour of his hair, then a Court of Appeal might well feel itself compelled to intervene. But when a judge, deliberately intending to exercise his discretionary powers, has acted on facts connected with or leading up to the litigation which have been proved before him or which he has himself observed during the progress of the case, then it seems to me that a Court of Appeal, although it may deem his reasons insufficient and may disagree with his conclusion, is prohibited by the statute from entertaining an appeal from it."

What it comes, to, I think, is that in order to justify an appeal as to costs only this court must be able to say that the judge in the court below, however much he may have been purporting to exercise his discretion, has not really exercised his discretion at all. This court can say that, but can say it only, as I see it, if it is satisfied that the judge in the court below has taken into consideration wholly extraneous and irrelevant matters. That, I think, is also substantially in accordance with what Jenkins LJ said in ***Baylis Baxter Ltd v Sabath*** ([1958] 2 All ER 209 at p 215):

"The matter as it now stands really comes to this, that in a case of this sort—that is to say, in a case in which it is sought to appeal, without leave, from an order relating solely to costs—such an application should not be entertained, in view of the express terms of s. 31(1)(h) of the Judicature Act, 1925, unless the circumstances are such that this court can say, in effect, 'In this case the learned judge did not in truth exercise his discretion at all'. It is only in a case of that kind that this court has jurisdiction to entertain such an appeal." (Underling added)

[6] Accordingly, in order to grant leave to appeal against order for cost Plaintiff must show court had not exercised discretion at all and/ or has considered extraneous/ irrelevant matters.

[7] In the proposed grounds of appeal Defendant relied on the amount of cost awarded as 'harsh and excessive'.

[8] Defendant must show that court did not exercise discretion. Defendant's contention that cost was excessive cannot not be accepted. An order for cost of $4, 000 in High Court after a hearing cannot be considered as excessive, considering the nature of application and after a hearing such a cost cannot be excessive.

[9] An order for $4,000 against a caveator cannot be considered as harsh considering that Plaintiff had instituted this action and had served the summons through a registered bailiff and had filed affidavit in support as well as affidavit of service and also an affidavit in reply. Counsel for Plaintiff had also made oral as well as written submission and in the circumstances an order for $4,000 is not excessive considering the orders for costs made by this court as well as superior courts. This cannot be considered as "harsh" considering cost of litigation.

[9] Accordingly Application for leave to appeal against the order for cost is refused. It is axiomatic that without leave being granted the order for stay fails. Already Plaintiff had obtained the removal of caveat in terms of the judgment.

CONCLUSION

[10] Leave to appeal against cost order of $4,000 is refused. The cost follow the event and Plaintiff is entitled to the cost of this application. If there is no agreement as to cost of this application Plaintiff is at liberty to make an application for assessment summarily, by the court.

FINAL ORDERS

a. Leave to appeal against order for payment of cost in terms of Section 12(e) of Court of Appeal Act 1949 refused.

b. Cost of this application to be assessed if not agreed between the parties.

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Deepthi Amaratunga
Judge

HIGH COURT OF FIJI
SUVA

At Suva this 21st day of March, 2024.

Solicitors:
Jiaoji Savou
Capital Legal